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## **Advisory Opinion 08-020**

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below.

### **Facts and Procedural History:**

On June 6, 2008, IPAD received a letter, dated June 3, 2008, from Susan Segal, Minneapolis City Attorney. In her letter, Ms. Segal asked the Commissioner to issue an advisory opinion regarding the classification of certain data the Minneapolis Civilian Police Review Authority (CRA) maintains. IPAD requested clarification, which Lisa Needham, Assistant City Attorney, provided on June 25, 2008.

IPAD, on behalf of the Commissioner, wrote to Ann Walther, Michael Friedman, Michael Weinbeck, and James Cannon, in letters dated June 26, 2008, to inform them of Ms. Segal's request, because they had asked for the opportunity to provide comments, which each of them did. A summary of the facts follows.

Ms. Segal wrote:

Via ordinance, the City established [the CRA] 'for the purpose of investigating allegations of misconduct on the part of officers of the Minneapolis Police Department and making findings of fact and conclusions based upon those findings of fact.' *See* Minneapolis Code of Ordinances [M.C.O.] 172.10. . . .

The CRA's investigative process includes the following steps:

- Receive complaint
- Perform preliminary review and determine whether the investigation is warranted
- If warranted, investigate complaint.
- Following investigation, investigator prepares findings and recommends that the complaint be sustained or not sustained.

*See* M.C.O. 172.70-172.95.

A panel of the CRA conducts a hearing when an investigation is complete, after which the panel must, within 30 days, issue a report containing findings of fact and a determination of either

“complaint sustained” or “complaint not sustained.” The CRA must notify the complainant and the officer of the hearing panel’s determination. See CRA Rule 11 (K).

If the complaint is not sustained by the CRA, the complainant may, within 30 days, request a reconsideration hearing; the CRA must grant such a request. If the complaint is sustained by the CRA, the CRA must forward, to the chief of police, the investigatory file, findings of fact, and the panel’s determination.

Ms. Segal wrote that under M.C.O. 172.130:

Once the file is forwarded to the police chief, the CRA’s role in the matter is complete. The CRA has no authority to take disciplinary action against a police officer. The decision of whether to impose discipline is in the exclusive purview of the police department and its chain of command. Pursuant to the CRA Ordinance, however, the police department is not allowed to revise the findings or determination of the CRA, even if the police chief determines that no discipline is warranted.

Once the CRA file has been presented to the chief of police, the chief may, at his discretion, impose discipline, determine that discipline will not be imposed, or request that the CRA reconsider the sustained finding. . . . The chief is required to base his disciplinary decision on the facts as determined by the CRA. . . . If the chief decides to impose discipline, the officer is, of course, free to grieve the proposed disciplinary action under the collective bargaining agreement.

### **Issues:**

Based on Ms. Segal’s request, the Commissioner will address the following issues:

1. Pursuant to Minnesota Statutes, Chapter 13, what is the classification of the following data related to the Minneapolis Civilian Police Review Authority’s (CRA) investigative process: the data described in the CRA’s Administrative Rule 6(B)(4)(d)?
2. Given the answer(s) to Issue 1, would it violate a data subject’s rights if the CRA disclosed to a complainant the fact that his/her complaint was in whole or in part not sustained, as set forth in the Minneapolis Code of Ordinances 172.120, and CRA Rule 11 (K) and Rule 12, regarding the complainant’s right to make a request for reconsideration?

### **Discussion:**

Pursuant to Minnesota Statutes, section 13.03, government data are public unless otherwise classified.

Minnesota Statutes, section 13.43 classifies data on individuals who are current or former employees of a government entity. Section 13.43, subdivision 2 lists the types of personnel data that are public and subdivision 4 classifies most other types of personnel data as private.

In a situation in which someone has complained about an employee, the following data are public pursuant to section 13.43, subdivision 2(a)(4): the existence and status of the complaint or charge.

When a government entity has taken disciplinary action against an employee and a final disposition has occurred, the following data are public under section 13.43, subdivision 2(a)(5): the final disposition of any disciplinary action together with the specific reasons for the action and data documenting the basis for the action.

In Advisory Opinion 04-047, the Commissioner opined:

Although the word ‘status’ is not defined in section 13.43, or elsewhere in Chapter 13, the Minnesota Supreme Court used the following definition in a recent case: ‘[a] stage of progress or development.’ (See *Navarre v. South Washington County Schools*, 652 N.W.2d, 9, 22 (Minn. 2002) (footnote 4).) . . . Thus, the ‘status’ of a complaint against an employee means whether the complaint has been filed, is under investigation, is closed, no discipline was imposed, or similar descriptions of the stages in an entity’s investigatory process. By releasing only data explaining the status of a complaint/charge in response to a data request, the government entity is able to inform the public what it is doing or has done in response to a complaint while simultaneously protecting the rights of employees who are the subjects of the complaint.

*Issue 1: Pursuant to Minnesota Statutes, Chapter 13, what is the classification of the following data related to the Minneapolis Civilian Police Review Authority’s (CRA) investigative process: the data described in the CRA’s Administrative Rule 6(B)(4)(d)?*

According to Ms. Segal:

The CRA has promulgated administrative rules providing more detailed information on CRA processes. Specifically of importance to this request, the CRA’s administrative rules [Rule 6(B)(4)(d)] state that the following information is ‘status’ information and therefore public data:

1. The fact that a complaint has been withdrawn by the Complainant.
2. The fact that a Complaint has been dismissed.
3. The fact that a Complaint is in mediation.
4. The fact that a mediation agreement has been reached.
5. The fact that a Complaint is being investigated.
6. The fact that a Complaint has been referred to a panel of the board for hearing.
7. The fact that a Request for Reconsideration to the full board is pending.
8. The fact that a complaint was not sustained, or that a complaint was sustained.
9. The fact that a Complaint has been referred to the Chief.

According to Ms. Segal, the CRA's current practice is that, even though the statements numbered 8 and 9 provide otherwise, prior to a final disposition it does not make public the fact that a complaint was sustained, and that a complaint was referred to the police chief. She wrote that the City considers these data private, because they are data related to "interim pre-discipline steps."

Ms. Segal further described the CRA investigative process:

In cases where there is a 'split' decision by the CRA – a finding that some allegations are sustained while other allegations are not – the CRA has been directed to advise complainants that 'some or all of their allegations were not sustained.' While it could be inferred from this wording that part of the complaint was sustained, the CRA wanted a mechanism to inform complainants when there is a split decision of their right to seek reconsideration.

In discussing the implications of the ordinance requirements, Ms. Segal wrote:

Although the CRA's ordinance requires all files be forwarded to the chief of police for review, in practice, the only files that have been forwarded are those where a complaint has been sustained. Thus, disclosure of the fact that a CRA file is being 'forwarded to the chief for a disciplinary decision' would, as a practical matter, reveal that a complaint has been sustained.

When none of the allegations are sustained, complainants are advised that 'the complaint was not sustained' as opposed to the statement in split decisions that 'some or all of the allegations were not sustained.'

As Ms. Segal noted, the CRA has no authority to impose disciplinary action against a police officer. She stated "[t]he decision of whether to impose discipline is in the exclusive purview of the police department and its chain of command. . . . [However,] the chief is required to base his disciplinary decision on the facts as determined by the CRA." Thus, the entire CRA process is pre-disciplinary. Accordingly, until there is a final disposition of disciplinary action, the only data related to the CRA's investigation into a complaint or charge that are public are the existence and status of the complaint or charge.

According to the CRA's Administrative Rule 6(B)(4)(d), the data described in the statements numbered 1-9, listed above, are all "status" data and therefore are public, regardless whether there has been a final disposition of disciplinary action. The Commissioner respectfully disagrees; in her opinion, some of the data at issue are public and some are private.

The Commissioner agrees that the data in the statements numbered 1, 2, 3, 4, 5 and 6 above are "status" data and are therefore public.

One note about the statements numbered 3 and 4, which relate to mediation (complaint is in mediation; mediation agreement reached). According to M.C.O. 172.150 (k), all

complaints shall be referred to mediation except under specified circumstances. Given the direction the Court provided in *Navarre*, if the CRA at some point decides to provide more details regarding eligibility for mediation in its Administrative Rules, it is possible that statements numbered 3 and 4 might under some circumstances disclose more than the status of the complaint or charge.

The CRA's process provides that the CRA shall notify the complainant immediately of the hearing panel's determination. If the complainant disagrees with the decision, s/he has the right to ask for reconsideration. (See M.C.O. 172.120 and CRA Rules Rule 11(K)(4) and (5).) The Commissioner finds this aspect of the CRA's process problematic.

As the Commissioner opined in Advisory Opinion 01-037, an entity cannot reveal to a complainant that his/her complaint has been substantiated prior to final disposition of disciplinary action; to do so amounts to a release of more data than simply the status of the complaint. The Commissioner acknowledges that in order to provide the right to reconsideration, the complainant must be informed of the hearing panel's determination. However, as the CRA process is structured, doing so violates the officer's rights, as the Commissioner discussed in 01-037.

Statement number 7 states that a request for reconsideration is pending. Prior to final disciplinary action, that statement reveals not public data. Thus, the data described in statement number 7 are not public.

Ms. Segal noted that despite the Rule, the CRA considers the data described in the statements numbered 8 and 9 to be private. The Commissioner concurs. However, once there is no possibility that the police chief will take disciplinary action, the Commissioner believes it is permissible for the City to inform the public that the matter is closed and no disciplinary action was taken.

In summary, the CRA's investigative process occurs, in its entirety, before the police chief makes any decision about discipline. Therefore, all of the data generated in that process are classified as private, with the exception of the existence or status of any complaint or charge. The Commissioner is of the opinion that the following data enumerated in the CRA's Administrative Rule 6(B)(4)(d) are public, as they describe the "status" of a complaint or charge: statements numbered 1-6. Statements numbered 7-9 describe more than just the status of the complaint or charge, and therefore are not public prior to final disposition of disciplinary action.

***Issue 2:*** *Given the answer(s) to Issue 1, would it violate a data subject's rights if the CRA disclosed to a complainant the fact that his/her complaint was in whole or in part not sustained, as set forth in the Minneapolis Code of Ordinances 172.120, and CRA Rule 11 (K) and Rule 12, regarding the complainant's right to make a request for reconsideration?*

As discussed above, it would violate an officer's rights if the CRA disclosed to a complainant, absent the data subject's consent, that his/her complaint was in whole or in part not sustained, because at that point in the process, there has been no final disposition of disciplinary action. As structured, the part of the CRA's process that allows for reconsideration is flawed, because it requires disclosure of more data than just the status of the complaint or charge.

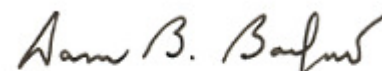
The Commissioner acknowledges that the CRA process was intended to be as open to public scrutiny as possible. However, it must be designed in conformity with the requirements of Chapter 13.

**Opinion:**

Based on the facts and information provided, my opinion on the issues that Ms. Segal raised is as follows:

1. Pursuant to Minnesota Statutes, Chapter 13, the following data related to the Minneapolis Civilian Police Review Authority's (CRA) investigative process, namely the data described in the CRA's Administrative Rule 6(B)(4)(d), are classified thus: the statements numbered 1-6 are public. The statements numbered 7-9 are private data prior to a final disposition of disciplinary action.
2. Given the answer(s) to Issue 1, it would violate a data subject's rights if the CRA disclosed to a complainant the fact that his/her complaint was in whole or in part not sustained, as set forth in the Minneapolis Code of Ordinances 172.120, and CRA Rule 11 (K) and Rule 12, regarding the complainant's right to make a request for reconsideration.

Signed:



Dana B. Badgerow  
Commissioner

Dated:

August 6, 2008